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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROKNEDIN ROKNI,

Plaintiff and Appellant,

v.

MANUCHER MOSTADIM et al.,

Defendants and Respondents.

B173905

(Los Angeles County
Super. Ct. No. SC076043)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Terry B. Friedman, Judge. Affirmed.

Donald S. Cook for Plaintiff and Appellant.

Law Offices of Nico N. Tabibi and Nico N. Tabibi for Defendants and
Respondents.

We affirm a judgment of dismissal entered after the trial court sustained demurrers to the plaintiff's first and second amended complaints, and later refused to permit the plaintiff to file an untimely third amended complaint.

FACTS

A.

Roknedin Rokni, individually and doing business as Millennium Property Management, sued Manucher Mostadim (a resident of Germany), Samsa, Inc., Montana LLC, Goshen LLC, Midson LLC, Nama LLC, and 10606 Kinnard LLC (the entities are all California residents) for damages for breach of contract and common counts. According to Rokni's verified original complaint (filed in February 2003), there were two written contracts and one oral agreement:

(1) The June 1998 Agreement is a written contract between Millennium (by Rokni) and Samsa (by Mostadim), dated June 1, 1998, pursuant to which Rokni agreed to manage rental property located at 11837 Mayfield Avenue, for which he was to be paid a percentage of the property's gross income. The agreement was for a period of six months, at the end of which the parties would "review" their dealings. By its terms, this agreement expired in December 1998.

(2) The December 2000 Agreement is a written contract between Millennium (by Rokni) and Nama (by Mostadim), dated December 11, 2000, pursuant to which Rokni agreed to manage rental property located at 1831 Colby Avenue, for which he was to be paid a percentage of the property's gross income. The agreement was for a period of six months, at the end of which the parties would review their dealings. By its terms, this agreement expired in June 2001.

(3) The Oral Agreement. According to the original complaint, Rokni and the defendants, at some unstated time, "agreed in oral agreements . . . for [Rokni] to provide management services for all the other properties now owned by such Defendants identical to [the] terms [of] the June 1998 and December 2000 Agreements [which written agreements] are collectively memoranda of the oral agreements" Additionally, alleged Rokni, he was required by the oral agreement to negotiate the purchase and sale of "various parcels of real property" on behalf of Samsa and Nama for which he was given a power of attorney by Mostadim, and for which he was to be paid a percentage of the purchase or sale price of each parcel.

Rokni alleged that he had fully performed all the management agreements (he doesn't say when) and had demanded payment (a total of \$585,000), and that he had negotiated the purchase or sale of properties (11633 Chenault Street and 11841 Mayfield Avenue, for which he was owed a total of \$85,350), but that Mostadim, Samsa, and the other defendants had failed and refused to pay. In addition to two breach of contract causes of action, Rokni alleged a common count (account stated) in which he claimed that, between January 2000 and January 2003, he sent statements to the defendants for a total of \$676,367, none of which has been paid.

Samsa, Montana, Goshen, Midson, and Nama demurred but Rokni filed a first amended complaint before the demurrers were heard. (Code Civ. Proc., § 472.)

B.

Rokni's verified first amended complaint, filed in May 2003, is identical to the original complaint save for the addition of two more common counts, one for money had and received, the other for work and services performed.

The entity defendants demurred on numerous grounds (and also moved to strike various allegations), contending among other things that the first amended complaint was fatally ambiguous in its allegations about undated and otherwise nonspecific "separate oral agreements," and that the two written agreements were limited to Samsa and Nama and had nothing to do with the other defendants. Over Rokni's opposition, the trial court sustained the demurrers with leave to amend.

C.

Rokni's verified second amended complaint, filed in August 2003, alleged several causes of action:

Rokni's first cause of action alleged that in March 1999, Rokni and Mostadim (as the sole shareholder and "chief operating officer" of Samsa and Nama) orally agreed that Rokni would purchase (for himself and Samsa, Nama, and Mostadim) income real estate in the West Los Angeles area; that Rokni would "buy and sell real property on that basis and negotiate and enter into any contracts for the management and purchase of real property"; that for "the purposes and convenience of . . . Mostadim, who was then incarcerated in the Republic of Germany but who wished still to consummate real estate transactions," Rokni was "authorized to make and sign loan documents on the behalf of those Defendants"; and that, in consideration of Rokni's services, he

would receive "either . . . 2-1/2% . . . (for the first two properties) or . . . 3% . . . (for two other properties) of the purchase price of each such property." Rokni fully performed (by negotiating the purchase of the Montana Avenue, Colby Avenue, and Chenault Street properties) and received partial payment, but is still owed \$42,000 for this breach. No dates are alleged.

Rokni's second cause of action "involves a breach of the same oral contract" described above, pursuant to which he negotiated the purchase of property at 11841 Mayfield Avenue. He alleges that he is owed \$43, 050 for this breach, no part of which has been paid. No dates are alleged.

There is a third cause of action for quantum meruit arising out of the oral contract. The fourth (against Mostadim and Samsa) and fifth (against Mostadim and Nama) causes of action are for breach of the two written contracts described in Rokni's earlier pleadings. The sixth cause of action (against all defendants) is for breach of an oral contract entered in 1998 by Rokni and Mostadim for the management of seven properties owned by the various entity defendants. The seventh cause of action is for an account stated, and the eighth and final "cause of action" is entitled "to pierce the veil of the limited liability companies."

The entity defendants demurred and moved to strike portions of Rokni's second amended complaint. Over Rokni's opposition, the trial court (on October 21, 2003) sustained the demurrers -- without leave to amend the first and second causes of action for breach of an oral contract (on statute of frauds grounds), but with 15 days leave to amend the remaining causes of action. Defendants gave notice of the ruling on October 28.

D.

Rokni ignored the 15-day limit on his time to amend and did not file his verified third amended complaint until December 8, 2003, three weeks after his time expired. With similar disregard for the trial court's ruling, Rokni realleged his first and second causes of action (those to which the demurrers had been sustained *without* leave to amend), then added a few more details to his other causes of action.

Not surprisingly, the entity defendants responded with a motion to dismiss the third amended complaint (and quash the summons thereon), on the ground that the pleading was filed late and without leave of court. Rokni opposed the motion (in papers filed one day after they were due), relying on his lawyer's declaration that conceded the third amended complaint was filed three weeks late, asserted there was no prejudice to the defendants, and stated that he had to prepare "more than ten drafts of the Third Amended Complaint, expending in excess of twenty hours of attorney time as well as five hours of legal assistant time, in an effort to set forth the causes which [Rokni] has against these Defendants as clearly and as unassailably as [he] could. Further, much time was consumed in reviewing the same with [Rokni], I cannot set blame for this eventuality at his door. [Sic.] Due to a combination of calendar and illness, I found myself unable to present a clear, detailed statement for the Court before December 8, 2003."

Rokni also filed a motion for leave to file his untimely pleading. In a slightly different declaration, Rokni's lawyer added this: "Most of [the tardiness] was due to the press of other business and other deadlines which interfered, yet much of it was because of the difficulty of setting forth this complex set of relationships

with sufficient clarity to withstand the inevitable demurrer and motion to strike which would follow it. ***For that reason, when the deadline came and I was only started (when I had thought I would be finished), I took an additional three weeks to finish the Third Amended Complaint.***" (Emphasis added.) Counsel did not explain his failure to apply to the court for an extension of time.

On January 8, 2004, the trial court found that Rokni's lawyer was present in court when the demurrers were sustained with 15 days leave to amend, that counsel received written notice of that ruling, and that he failed to take any timely action. In the court's words, Rokni's opposition to the motion to dismiss "offers no good cause explanation for his admitted failure to file a timely Third Amended Complaint. [Rokni] has now had four opportunities to plead a proper complaint. That is enough. The Court dismisses the action."

E.

On January 12, 2004, Rokni filed a motion for relief from the January 8 dismissal. In his supporting declaration, counsel once again admitted his intentional decision to take "an additional three weeks" to finish the amended pleading, and added this: ***"I realized that the Third Amended Complaint was going to be late. I have been the recipient of many untimely amended complaints in the time I have practiced, and have drafted more than one, but have never had the experience of counsel for the Defendant moving to dismiss it on that basis. And relying on past practice, believed that no objection would be raised."*** (Emphasis added.) This, claimed Rokni in his memorandum of points and authorities, constitutes attorney neglect.

The entity defendants opposed the motion, which was denied on February 10, the court pointing out that Rokni's lawyer explained "the failure to file a timely Third Amended Complaint as due to the complexity of the case," and that "[n]owhere [did] counsel assert mistake, inadvertence, surprise or excusable neglect."

Rokni appeals from the order of dismissal, and also (purportedly) from the orders sustaining the demurrers to the first and second amended complaints, from an order denying one of his discovery motions, from the order granting the motion to dismiss, and from the order denying his motion for relief from the dismissal.

DISCUSSION

I.

We agree with Rokni's abstract assertion that a trial court's discretionary decisions to dismiss a lawsuit and to deny relief from the dismissal should include a review of all relevant factors, but disagree with his contention that the trial court failed to do so in this case.

Rokni relies on section 473, subdivision (b), of the Code of Civil Procedure. As relevant, this statute provides that the court "may . . . relieve a party or his . . . legal representative from a . . . dismissal . . . taken against him . . . through his . . . **mistake, inadvertence, surprise, or excusable neglect**. Application for this relief shall be accompanied by a copy of the . . . pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the . . . dismissal . . . was taken. . . . Notwithstanding any other requirements of this section, the

court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her ***mistake, inadvertence, surprise, or neglect***, vacate any . . . resulting . . . dismissal entered against his . . . client, ***unless the court finds that the . . . dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.*** . . ." (Emphasis added.)

According to counsel's declaration he, not his client, was the cause of the delay -- but the delay was (as the trial court found) deliberate and intentional, not the product of mistake, inadvertence, surprise or neglect. For this reason, the motion was properly denied.¹

II.

Assuming without deciding that the order sustaining the demurrer to the second amended complaint is reviewable on this appeal from the final judgment of dismissal (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶¶ 2:238.1 to 2:238.2, pp. 2-104 to 2-105), we reject Rokni's contention that the demurrer should have been overruled.²

A.

Rokni's action was filed in February 2003. The first cause of action of his second amended complaint alleges that in March 1999, he and Mostadim

¹ We summarily reject Rokni's suggestion that his tardy filing of the third amended complaint -- filed without leave of court -- somehow prevented the trial court from entertaining the motion to dismiss.

² By filing his second amended complaint, Rokni relinquished whatever right he might otherwise have had to challenge the order sustaining the demurrers to his first amended complaint. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 884 [an amended complaint supplants all prior complaints and only the amended complaint will be considered by the reviewing court].)

(allegedly acting on behalf of Samsa and Nama) orally agreed that Rokni would purchase (for himself and Samsa, Nama, and Mostadim) income property in the West Los Angeles area and that, in consideration of Rokni's services, he would receive a percentage of the purchase price of each property. Rokni alleged that he had fully performed but does not say when, and claims he is owed \$42,000 for a breach of this contract. Rokni's second cause of action alleges a breach of the same oral contract with regard to the purchase of another property, but he once again does not say when the alleged breach occurred. The third cause of action is for quantum meruit arising out of the same oral contract.

The trial court sustained the demurrers to these causes of action on the ground, among others, that the statute of frauds precludes enforcement of an oral contract relating to the sale of real property. (Civ. Code, § 1624, subd. (a)(4) [an agreement authorizing or employing an agent to purchase or sell or lease real property for compensation is invalid unless written].) Contrary to Rokni's assertion, the statute of frauds was raised in the demurrers to the second amended complaint, and the trial court's ruling is plainly correct. As a result, the issue has been waived by Rokni's failure to address the merits of the statute of frauds issue.³

³ The trial court sustained the demurrer to the quantum meruit cause of action on the ground that it was uncertain in that it included no details other than a reference to the void oral contract, there being no allegations about any entitlement on an equitable theory. Rokni does not address these issues in his opening brief.

B.

The demurrers to the other causes of action in the second amended complaint were also properly sustained.

The fourth (against Mostadim and Samsa) and fifth (against Mostadim and Nama) causes of action are for breach of the two written contracts described in Rokni's earlier pleadings. The demurrers to these causes of action were sustained on the ground that the allegations of the pleading were inconsistent with the terms of the unsigned documents attached to and incorporated into the second amended complaint (as to dates and amounts supposedly due). None of these inconsistencies are explained in Rokni's appellate briefs.

The sixth cause of action (against all defendants) is for breach of an oral contract entered in 1998 by Rokni and Mostadim for the management of seven properties owned by the various entity defendants. Rokni alleges the duties he was obligated to and did perform, and claims he is owed \$585,017. Although a breach is alleged, there is no allegation about when it occurred, and the demurrer was sustained on the ground, among others, that there is no way to tell whether this agreement is barred by limitations (and also on the ground that there were no facts alleged to show how the entity defendants could conceivably be liable on an oral agreement made only by Mostadim).

The seventh cause of action is for an account stated, and the eighth and final "cause of action" is entitled "to pierce the veil of the limited liability companies." These are remedies, not causes of action, and the demurrers were properly sustained for this reason alone.

As did the trial court, we reject Rokni's assertion that his second amended complaint was sufficient to put all of the defendants on notice of Rokni's claims. As the trial court put it, "[a]lthough this is one of the purposes of a complaint, there are further pleading requirements for specific facts, particularly when, as here, the claims are for breach of contract. It is insufficient for [Rokni] to rely on argument to put Defendants on notice; indeed it is improper for the court to consider any 'facts' not contained in the complaint."

In short, the demurrers to the second amended complaint were properly sustained. As a result, the discovery issues raised by Rokni are moot.

DISPOSITION

The judgment of dismissal is affirmed. Defendants are awarded their costs of appeal.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, Acting P.J.

SUZUKAWA, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.